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Nos. 99-1388 and 99-1389

In the Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal reserved water right may be satisfied from groundwater that, under Arizona law, is not subject to the doctrine of prior appropriation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546 (1963)	2, 4, 15
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983)	5
Bristor v. *Cheatham*, 255 P.2d 173 (Ariz. 1953)	4
Cappaert v. *United States*, 426 U.S. 128 (1976)	2, 3, 5, 16, 17, 18
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	10, 11, 12
Farmers Inv. Co. v. *Bettwy*, 558 P.2d 14 (Ariz. 1976)	4
General Adjudication of All Rights to Use Water in the Big Horn River System, In re, 753 P.2d 76 (Wyo. 1988), cert. denied, 492 U.S. 926 (1989)	13, 20
General Adjudication of All Rights to Use Water in the Gila River Sys. & Source, In re, 857 P.2d 1236 (Ariz. 1993)	19
Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997)	8, 9, 11
Market Street Ry. v. *Railroad Comm'n*, 324 U.S. 548 (1945)	8
Mimbres Valley Irrigation Co. v. *Salopek*, 564 P.2d 615 (N.M. 1977), aff'd, 438 U.S. 696 (1978)	13
O'Dell v. *Espinoza*, 456 U.S. 430 (1982)	9
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945)	8

Cases—Continued: Page

Rights to the Use of the Gila River, In re, 830 P.2d 442 (Ariz. 1992) 5
United States v. *City & County of Denver*, 656 P.2d 1 (Colo. 1983) 2, 3
United States v. *Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992) 5
United States v. *Jesse*, 744 P.2d 491 (Colo. 1987) 3
United States v. *New Mexico*, 438 U.S. 696 (1978) 2, 3, 13, 17
United States v. *Superior Court*, 697 P.2d 658 (Ariz. 1985) 5
Winters v. *United States*, 207 U.S. 564 (1908) 2, 15
Wyoming v. *United States*, 492 U.S. 406 (1989) 13

Constitution and statutes:

U.S. Const.:
Art. IV, § 3, Cl. 2 ..... 13, 15
Amend. V (Double Jeopardy Clause) 11
McCarran Amendment, 43 U.S.C. 666 2
28 U.S.C. 1257(a) 7, 8, 10, 13, 21
42 U.S.C. 1983 (Supp. III 1997) 8
Ariz. Rev. Stat. Ann. (West 1994 & Supp. 1999):
§§ 45-251 to 45-260 5
§§ 45-401 *et seq.* 4

Miscellaneous:

John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657 (1988) 4

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OPINION BELOW

The opinion of the Supreme Court of the State of Arizona (Pet. App. A1-A31) is reported at 989 P.2d 739. The order of the Superior Court of the State of Arizona (Pet. App. D1-D30) is unreported.

JURISDICTION

The decision of the Arizona Supreme Court was entered on November 19, 1999. The petitions for a writ of certiorari were filed on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). As discussed at pages 8-15, *infra*, this Court

does not have jurisdiction because the Arizona Supreme Court's interlocutory opinion is not a final judgment within the meaning of 28 U.S.C. 1257(a).

STATEMENT

Petitioners seek review of an interlocutory decision of the Arizona Supreme Court in an ongoing general stream adjudication of the Gila River System. The United States was joined as a defendant under the McCarran Amendment, 43 U.S.C. 666. The Arizona Supreme Court certified a set of issues for interlocutory appeal, and that court addressed two of those issues, involving the relationship between federal reserved water rights and Arizona's system for administering groundwater, in the decision that petitioners ask this Court to review.

1. This Court ruled in *Winters* v. *United States*, 207 U.S. 564 (1908), that the establishment of an Indian reservation carries with it an implicit reservation of sufficient water to accomplish the purpose of the reservation. The Court has recognized that principle, sometimes referred to as the *Winters* doctrine or the doctrine of federal reserved water rights, on numerous occasions. See, *e.g.*, *United States* v. *New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-600 (1963); see also *United States* v. *City & County of Denver*, 656 P.2d 1, 17-18 (Colo. 1983). The *Winters* case involved an Indian reservation, but the Court has made clear that the principle applies to other types of federal reservations. See *Cappaert*, 426 U.S. at 138 (national monument); *Arizona* v. *California*, 373 U.S. at 601 (Indian reservations created by executive order, national forests, national recreation areas, and national wildlife refuges).

The Court will recognize a federal reserved water right if the circumstances surrounding the creation of a federal reservation indicate that the government intended to set aside water for a federal purpose. See *Cappaert*, 426 U.S. at 139. The Court infers that the government intended to do so if water is "necessary to accomplish the purposes for which the reservation was created." *Ibid.*; accord *New Mexico*, 438 U.S. at 702 ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

The determination of the parameters of the federal reserved water right, such as the amount of water reserved, inevitably requires a fact-intensive inquiry. See *Denver*, 656 P.2d at 20. Because federal reserved water rights are established by federal law, they can, and frequently do, have different characteristics than water rights created under state law. See, *e.g.*, *Cappaert*, 426 U.S. at 145; see also *United States* v. *Jesse*, 744 P.2d 491, 494 (Colo. 1987).

2. Arizona law generally classifies water into three categories: (1) surface water, such as lakes, ponds, rivers, and streams, including underground streams; (2) "subflow" groundwater that is closely connected hydrologically to surface water; and (3) "percolating" groundwater that is not so closely connected to surface water. See Pet. App. A10-A11. Rights to the first two categories, surface water and subflow groundwater, are governed by the state law doctrine of "prior appropriation." Rights to percolating groundwater, however, are

subject to the state law doctrine of "reasonable use." See *id.* at A10.[1]

Prior appropriation rights differ significantly from reasonable use rights. Under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona* v. *California*, 373 U.S. at 555. The reasonable use doctrine, on the other hand, permits a landowner to capture as much of the groundwater underlying the landowner's property as can be used on the overlying land, regardless of whether the landowner's pumping of groundwater diminishes the water available to others. See *Bristor* v. *Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Under the "reasonable use" doctrine, no groundwater user has a secure right to pump a specific quantity of water, because pumping is always susceptible to being interfered with, without liability, by neighbors making reasonable use of groundwater on their overlying land. See, *e.g.*, *Farmers Inv. Co.* v. *Bettwy*, 558 P.2d 14, 25 (Ariz. 1976) (Cameron, C.J., dissenting).

The Arizona Supreme Court's decision here addressed the issue of whether the United States can claim a federal reserved right to water that Arizona would classify as "percolating groundwater." In petitioners' view, a federal reservation's rights to percolat-

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[1] Arizona has also enacted legislation that addresses groundwater use. See Ariz. Rev. Stat. Ann. §§ 45-401 *et seq.* (West 1994 & Supp. 1999). That legislation, which is not at issue here, may play a significant role in regulating groundwater in certain areas of the State. See John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657, 707-725 (1988).

ing groundwater should be governed by Arizona's reasonable use doctrine. The question is potentially significant because, if a federal reservation were subject to the "reasonable use" doctrine, it might potentially be entitled to more groundwater than under the federal reserved water rights doctrine, but the right would be less secure, because the groundwater source would be subject to depletion by groundwater pumping on adjacent land. A federal reserved water right, by contrast, would limit the federal reservation to the quantity of groundwater necessary to fulfill the needs of the reservation, but it would also prevent adjacent landowners from pumping groundwater if that pumping interferes with the reservation's right to receive sufficient water to meet its needs. See *Cappaert*, 426 U.S. at 142-143.

3. This case arose out of a general stream adjudication in accordance with Arizona law. See Ariz. Rev. Stat. Ann. §§ 45-251 to 45-260 (West 1994 & Supp. 1999). The adjudication will determine all rights to use waters of the Gila River System in Arizona. The adjudication's history is described in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 557-559 (1983). See also *In re Rights to the Use of the Gila River*, 830 P.2d 442, 444-445 (Ariz. 1992); *United States* v. *Superior Court*, 697 P.2d 658, 663-664 (Ariz. 1985). The United States claims federally reserved water rights to the use of certain waters in the Gila River System on its own behalf and as trustee for several Indian reservations. The United States also claims water rights arising under Arizona law, as well as rights confirmed by the 1935 Globe Equity Decree entered by the United States District Court for the District of Arizona. See *United States* v. *Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992) (action to enforce the 1935 decree).

In 1988, during the early phases of this adjudication, the trial court entered a "Groundwater/Surface Water Order" that addressed several general physical and legal aspects of groundwater-surface water relationships, including various generic issues regarding federal reserved water rights. See Pet. App. D1-D32. The court's order included a ruling that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose." *Id.* at D23.

Numerous parties petitioned the Arizona Supreme Court for interlocutory review of the Groundwater/Surface Water Order. The Arizona Supreme Court granted some of the petitions, granted others in part, and denied others. See Pet. App. B1-B17. The Arizona Supreme Court certified six issues for interlocutory appeal. See *id.* at B2-B3. Among the certified questions was the issue of whether federal reserved water rights in Arizona extend to groundwater that is not subject to the doctrine of prior appropriation under Arizona law. See *id.* at B3.

The Arizona Supreme Court's determination of the certified questions was interrupted by a 1995 challenge to the constitutionality of Arizona legislation that amended certain provisions of state water law. See Pet. App. A7-A9. The Arizona Supreme Court has since resumed consideration of the certified questions and has unanimously ruled that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30. The court explained that

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Id. at A20. The court acknowledged that its ruling would recognize water rights in connection with federal reservations that they would not have under state law, but noted that it could not apply state law "where to do so would defeat federal water rights." *Id.* at A22. Finally, the court noted that its decision

> do[es] not * * * decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Id. at A24.

ARGUMENT

This Court should decline to review the Arizona Supreme Court's decision because that decision is not a final judgment within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state court decisions. Even if the Arizona

Supreme Court's decision were final, further review is unwarranted because the decision is correct and does not create any conflict with other decisions that would warrant the Court's review at this time.

1. This Court has jurisdiction to review by writ of certiorari decisions by the highest court of a State involving federal law if the state court decision is a "[f]inal judgment[] or decree[]." 28 U.S.C. 1257(a). The Arizona Supreme Court's avowedly "interlocutory opinion[]" (Pet. App. A6) in this case does not constitute a final judgment for purposes of 28 U.S.C. 1257(a). This Court therefore should deny the petitions for a writ of certiorari.

a. Section 1257(a) "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). The finality rule "is not one of those technicalities to be easily scorned" but instead "is an important factor in the smooth working of our federal system." *Ibid.* (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).[2]

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[2] In *Jefferson*, the petitioner asked this Court to review whether a state wrongful death statute governs recovery of damages when a decedent's estate claims, under 42 U.S.C. 1983 (Supp. III 1997), that the death resulted from a deprivation of federal rights. See 522 U.S. at 77. The state supreme court had decided that question of federal law on a pretrial interlocutory certification by the trial court. This Court initially granted a petition for a writ

The Arizona Supreme Court's decision in this case is plainly not a final judgment. Like the order at issue in *Jefferson*, it is an "avowedly interlocutory" decision that arose from the state court's decision to certify certain questions. Compare *Jefferson*, 522 U.S. at 81, with Pet. App. A6, A8. The Arizona Supreme Court's decision does not terminate the litigation or resolve any of the claims in the water adjudication. Rather, it simply provides guidance to the trial court on several preliminary matters respecting the federal water rights claims. As the Arizona Supreme Court stated:

> We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater.

Pet. App. A24. The Arizona Supreme Court's decision is clearly an "intermediate step[]"—and not that court's "final word"—on the federal water rights claims. See *Jefferson*, 522 U.S. at 81. As in *Jefferson*, the petitioners' challenges may become moot as the litigation progresses. If they do not become moot, petitioners will be able to seek this Court's review "when the state-court proceedings reach an end." *Id.* at 77-78, 82-83.

b. Here, as in *Jefferson*, the state supreme court's decision does not fall "within the 'limited set of situations in which [the Court has] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts.'" 522 U.S. at 82 (quoting *O'Dell* v. *Espinoza*, 456 U.S. 430 (1982) (per curiam)).

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of certiorari on that question, but, after argument, "dismiss[ed] the writ for want of a final judgment." *Id.* at 78.

Specifically, the decision does not fall within any of the four situations that the Court identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), in which the decision of a state court is effectively final notwithstanding the prospect of further state court action.[3]

The Arizona Supreme Court's decision plainly does not fall within the first two categories identified in *Cox Broadcasting*, which involve situations in which the court's interlocutory decision effectively resolves the federal claim, regardless of proceedings on remand, and the decision is therefore final for purposes of this Court's review. In this case, the state supreme court's decision leaves no doubt that final resolution of the federal claim depends on proceedings on remand. The state supreme court ruled that "[f]ederal reserved

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[3] *Cox Broadcasting* identifies four categories of cases in which a state court decision may satisfy Section 1257(a)'s finality requirement, notwithstanding the pendancy of proceedings on remand: (1) "cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." See 420 U.S. at 477-483.

rights extend to groundwater *to the extent groundwater is necessary to accomplish the purpose of a reservation.* Pet. App. A30 (emphasis added). Thus, under the interlocutory ruling of the Arizona Supreme Court, the United States will not be entitled to satisfy a federal reserved water right from groundwater unless it additionally demonstrates, in the proceedings on remand, that a particular reservation at issue in this case requires groundwater to accomplish the purposes of the reservation. Thus, the federal issue decided here is not ripe for review "regardless of the outcome of future state-court proceedings." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 480).

The Arizona Supreme Court's decision also does not fall into the third category described in *Cox Broadcasting*, which involves the situation in which the state court has resolved a federal claim and remanded the case for further proceedings, "but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 481). That situation typically arises where a state court reverses a criminal conviction on federal constitutional grounds and remands for retrial. If the State obtains a conviction on retrial, the federal issue is moot, and if the State obtains an acquittal on retrial, the Double Jeopardy Clause would foreclose an appeal to revisit the state court's resolution of the federal constitutional issue. See *Cox Broadcasting*, 420 U.S. at 481. This case does not present that problem. Here, as in *Jefferson*, petitioners would be free to seek this Court's review if the state court finally determines the relevant issues in a way that is adverse to petitioners' interests. See *Jefferson*, 522 U.S. at 82-83.

The petitioners in No. 99-1388 ultimately rely on the fourth category described in *Cox Broadcasting*. See 99-1388 Pet. 9-13.[4] That category embraces the situation in which (a) the party seeks review of a federal issue that "has been finally determined by the state courts for purposes of the state litigation"; (b) the party might prevail on remand on non-federal grounds, but reversal of the state court on the federal issue would preclude "any further litigation on the relevant cause of action"; and (c) this Court's "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483. The Arizona Supreme Court's decision, however, satisfies none of the three criteria.

First, the decision does not "finally determine[]" any federal water rights claim; the state supreme court remanded the case for the trial court to determine the individual federal reserved water claims based on the underlying purposes of each federal reservation. Second, the decision does not preclude further litigation on the relevant cause of action. The United States has asserted federal reserved water rights for various federal reservations without regard to whether the water source is surface water or groundwater, and the state court must determine the federal reserved rights for each reservation, regardless of whether groundwater is included or excluded. Third, the Arizona Supreme Court's recognition that the federal government may establish a federal reserved water right that includes groundwater, provided it makes the requisite showing of a federal intent to reserve the water, does not "erode" any federal policy. Rather, the court's

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[4] The petitioners in No. 99-1389 do not address the finality issue.

ruling effectuates both the policy of providing water to satisfy the needs of federal reservations consistent with the *Winters* doctrine and the overarching constitutional principle that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. See discussion at 15-19, *infra*.

c. Petitioners suggest (99-1388 Pet. 13) that this Court has created a special exception to the finality requirement for water rights adjudications, citing *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Wyoming* v. *United States*, 492 U.S. 406 (1989) (per curiam). Each of those cases, however, fell squarely within the second situation described in *Cox Broadcasting*. In *New Mexico*, the New Mexico Supreme Court had rejected the United States' claim of an entitlement to use water within the Gila National Forest for particular recreational and wildlife purposes. See *Mimbres Valley Irrigation Co.* v. *Salopek*, 564 P.2d 615 (1977), aff'd, 438 U.S. 696 (1978). In *Wyoming*, the Wyoming Supreme Court had determined a quantification of the United States' water rights claim for the Wind River Indian Reservation in Wyoming under the practicably irrigable acreage standard. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (1988), cert. denied, 492 U.S. 926 (1989). In each of those cases, the state supreme court's judgment was final for purposes of Section 1257(a) because the judgment finally determined the federal reserved water rights claim for a specific reservation and any further proceedings on remand would not affect the outcome for the reservation in question.

The Arizona Supreme Court's decision in this case presents a markedly different situation. The state court has not determined federal reserved water rights for *any* individual federal reservation. It has simply resolved one of several threshold issues for quantifying the United States' water rights for various reservations. The decision leaves to future litigation the "inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." Pet. App. A24. There is no warrant for this Court to assume jurisdiction at this juncture, where the state supreme court has not determined whether "any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Ibid.*

2. Even in the absence of the jurisdictional obstacle, the Arizona Supreme Court's ruling would not warrant this Court's review, especially at this interlocutory stage of the case. The state supreme court's decision is correct, it will have no immediate impact on any water user, and there is no conflict among the lower courts that would warrant the Court's review at this time.

a. The Arizona Supreme Court reached the common sense conclusion that "if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand." Pet. App. A20. As the court correctly observed,

> The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Ibid. The state supreme court accordingly held that "the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater." *Id.* at A24. "Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30.

The Arizona Supreme Court's ruling is unremarkable. There can be no serious doubt that Congress has the constitutional power to reserve unappropriated water for federally owned lands and to authorize the Executive Branch to make such reservations. See, *e.g.*, U.S. Const. Art. IV, § 3, Cl. 2; *Arizona* v. *California*, 373 U.S. at 597-601. As the state supreme court recognized, the question is simply one of federal intent. There is no reason to believe, as an "abstract" principle (Pet. App. A24), that the United States can never reserve that particular subset of groundwater that Arizona jurisprudence labels "percolating" groundwater. Rather, when the United States reserves water and does not designate the source, it is reasonable to conclude that the water would be taken from whatever water source is available to the reservation to meet the needs of the reservation. See *id.* at A19.[5]

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[5] As the state supreme court explained, "The reservations considered [in *Winters* v. *United States* and *Arizona* v. *California*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life." Pet. App. A19.

Petitioners' objections to the Arizona Supreme Court's ruling do not require extended discussion. There is no merit to petitioners' contention that the state supreme court's decision "frustrates clear federal policies and conflicts with controlling decisions of this Court." 99-1388 Pet. 14-22 (capitalization removed). To the contrary, the Arizona Supreme Court's decision effectuates the important federal policy, recognized in this Court's decisions, of ensuring that federally owned lands that are set aside for federal purposes have sufficient water to fulfill those purposes. See, *e.g.*, *Cappaert*, 426 U.S. at 143 ("Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water.").

Petitioners are also plainly wrong in contending that the state supreme court departed from this Court's teachings by "finding a federal reserved right to groundwater without considering the purposes of any specific reservation." 99-1388 Pet. 14-16 (capitalization altered). The state court made clear it was merely addressing the question of whether federal reserved rights must, in Arizona, apply only to surface water and are incapable, as a matter of law, of including groundwater. The court explicitly stated that its decision did not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." Pet. App. A24.

Petitioners are likewise mistaken in arguing that the Arizona Supreme Court should have "integrate[d] federal groundwater rights with existing state groundwater law." 99-1388 Pet. 16-17 (capitalization altered). In petitioners' view, the state supreme court should

have relied upon "the application of Arizona groundwater law in determining the nature of federal rights to groundwater." *Id.* at 17. The state supreme court correctly recognized, however, that this Court "has defined the reserved rights doctrine as an exception to Congress's deference to state water law." Pet. App. A21 (citing, *e.g.*, *New Mexico*, 438 U.S. at 714); see *Cappaert*, 426 U.S. at 145 ("determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation").[6]

Petitioners also assert that the Arizona Supreme Court has created a federal common law of reserved rights in groundwater and that, in doing so, it should have adopted "state law as the rule of decision." 99-1388 Pet. 17-22; 99-1389 Pet. 23-28; Arizona Response 20. That argument, however, misconceives the Arizona Supreme Court's decision. The court did not create a

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[6] Petitioners erroneously suggest that this Court's statement in *Cappaert* that a "reserved right in unappropriated water" is "superior to the rights of future appropriators" (426 U.S. at 138) indicates that federal reserved water rights apply only to water that could be appropriated under state law. 99-1388 Pet. 16. Petitioners' interpretation ignores the context of that statement. The Court used the term "unappropriated" as a short-hand expression for waters to which no vested rights had attached prior to the date of the creation of the federal reservation. It made that understanding clear elsewhere in the opinion when it stated that "the issue is whether the Government intended to reserve unappropriated *and thus available* water." 426 U.S. at 139 (emphasis added). The significance of water being "unappropriated" is that no prior rights have attached to it and, therefore, it is "available" to satisfy the purposes of the federal reservation. The United States can also reserve available water that is not subject to appropriation under state law. Indeed, if petitioners' contention were correct, it would lead to a stark anomoly: Congress could reserve water only in those States that adopted an appropriative water rights system. Nothing in the Property Clause ties Congress's hands in that way.

new body of federal common law; rather it simply adhered to this Court's reasoning in *Winters*, *Cappaert*, and *New Mexico* and refused to carve out a special exception to the federal reserved water rights principles articulated in *Winters* and subsequent cases based on a State's "arti[ficial]" distinctions between surface flow, subflow, and "percolating groundwater." See Pet. App. A10-A12. The Arizona Supreme Court's decision follows *a fortiori* from this Court's decisions: "the federal reserved right extends to groundwater when groundwater is necessary to accomplish the purpose of a federal reservation." *Id.* at A27.

There is no warrant for adopting state water law principles to determine federal water rights–especially when, as the Arizona Supreme Court candidly acknowledged, those principles rest on "a hydrological misconception." See Pet. App. A11. This Court made clear in *Cappaert* that the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation." 426 U.S. at 145. The Arizona Supreme Court correctly recognized that federal reserved rights are determined through "fact-intensive inquiries that must be made on a reservation-by-reservation basis" (Pet. App. A24) and not through the wholesale adoption of state rules of decision that are likely to have no direct bearing on (or may even directly frustrate) the "federal purpose of the reservation." See *Cappaert*, 426 U.S. at 143-146.

b. Some of the petitioners contend that the Arizona Supreme Court's decision will have "grave" and "disastrous" consequences for Arizona water users. 99-1389 Pet. 15-23; see also 99-1388 Pet. 22-24. Those assertions are hyperbole. The state supreme court affirmed a *1988* trial court ruling that "the federal reserved water rights doctrine applies not only to surface water but to

groundwater." Pet. App. A24; see *id.* at D23. The state supreme court also made clear that its decision does not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Id.* at A24. The situation is no different now than it was before the state supreme court's ruling, save that the state supreme court has now affirmed the trial court's long-outstanding determination of a particular legal issue that may or may not have significance with respect to any particular federal reservation. The state supreme court's interlocutory decision will have no immediate impact, and its ultimate practical effect cannot be judged until the trial court adjudicates the United States' water rights claims.[7]

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[7] Petitioners have no basis for suggesting that "most of the heretofore non-appropriable groundwater would be controlled by a few federal enclaves" or that "[m]ost other landowners * * * would be forced to cease or sharply curtail their pumping [of groundwater], causing extensive dislocation and hardship." 99-1389 Pet. 20-21. Indeed, petitioners' predictions that grave consequences will result from the Arizona Supreme Court's decision contradict their later assertion that Arizona law already entitles federal reservations to sufficient groundwater to meet the reservations' purposes. See *id.* at 24. Furthermore, a significant premise underlying the petitioners' arguments—that most of Arizona's groundwater is "percolating" groundwater—is open to debate. As the state supreme court explained, Arizona law distinguishes between "subflow" groundwater, which is subject to the doctrine of prior appropriation and "percolating" groundwater, which is not. Pet. App. A10-A11. The boundary between subflow groundwater and percolating groundwater "is, to some extent, artificial and fluid" and remains to be resolved by Arizona courts. *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236, 1246 (Ariz. 1993) (vacating and remanding to the trial court for a determination of the criteria for differentiating between appropriable subflow and percolating groundwater). If the Arizona courts define the subflow zone

c. Petitioners also claim that the Arizona Supreme Court's decision warrants review because it is in conflict with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River, supra.* See 99-1388 Pet. 28- 29; 99-1389 Pet. 11-12; Arizona Response 13. The Wyoming Supreme Court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d at 99. It nevertheless ruled, contrary to that logic, that the reserved water doctrine "does not extend to groundwater." *Id.* at 100. The Wyoming Supreme Court reached that result because it could find no case expressly holding that federal reserved water rights extend to groundwater. See *id.* at 99-100.

The Arizona Supreme Court properly rejected the Wyoming Supreme Court's reasoning. The Arizona Supreme Court stated:

> We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Pet. App. A17.[8] The Arizona Supreme Court has now provided a persuasive decision squarely holding that

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broadly, then the issue of whether federal reserved rights extend to percolating groundwater may turn out to be relatively unimportant.

[8] The Arizona Supreme Court also noted that there is more precedential support for its result than the *Big Horn* decision suggested. See Pet. App. A16 n.6, A17-A20 (discussing relevant cases).

the reserved water rights doctrine extends to groundwater. It is therefore possible that, if the Wyoming Supreme Court were faced with the issue again, it might well reconsider its decision and reach the "logical" outcome. At a minimum, the apparently divergent decisions of the Arizona Supreme Court and the Wyoming Supreme Court—which reflect the views of only two of the fifty States and have not yet resulted in any practical consequences for any water user—do not give rise to a mature conflict that would warrant this Court's review. Accordingly, even if the Arizona Supreme Court's decision were a final judgment for purposes of 28 U.S.C. 1257(a), it would not present a matter warranting this Court's review at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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